FILED
JUL 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1540

IN THE

Supreme Court of the United States

MALLINCKRODT INC.

Petitioner,

v.

MAINE PEOPLE'S ALLIANCE AND NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF OF PETITIONER

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July 2, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF OF PETITIONER

Respondents do not, because they cannot, refute petitioner's showing that the decision below raises two fundamentally important issues of federal law. The First Circuit ruled that federal courts can determine that an increased risk of potential harm is societally unacceptable, then use that quintessentially legislative judgment as the predicate for an exercise of judicial power under Article III. The lower court also adopted a concededly "'sweeping'" and "expansive reading" of § 7002(a)(1)(B) of the Resource Conservation Recovery Act (RCRA), Pet. App. 18a, 31a, that permits private citizens to second guess and override policy-based risk assessments of the Environmental Protection Agency (EPA). Respondents' lengthy defense of these rulings serves only to confirm the need for this Court's review.

1. As petitioner has explained, this case raises a question of standing that this Court has not previously resolved: whether a non-*de minimis* risk of future harm is a cognizable injury-in-fact, when no expert and politically accountable agency has deemed that risk unacceptable, and plaintiffs are not suing under a statute that provides a right to judicial review of an agency's failure or refusal to address that risk. Respondents deem it "radical" to challenge a finding of standing that is based on risks of future harms outside these two recognized categories of case. Opp'n 3. But the very cases they cite simply underscore the deviant nature of the lower court's standing determination.

Respondents rely heavily on the decision in *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). See Opp'n 5-6. But, in that case, the Court found plaintiffs' concerns reasonable given the defendant's "continuous and pervasive *illegal* discharges of pollutants." 528 U.S. at 184 (emphasis added). The Third Circuit's decision in *Interfaith Community Organization* v.

Honeywell International, Inc., 399 F.3d 248 (3d Cir.), *cert denied*, 545 U.S. 1129 (2005), is similarly unhelpful, as the court concluded that the discharge of one of the most toxic carcinogens was illegal. *Id.* at 252-53 & n.1, 255-56. These cases simply illustrate that a risk of future harm is a cognizable injury when a politically accountable body has deemed that risk unacceptable. Because the First Circuit found injury-in-fact in the absence of such a determination, its decision represents an expansion of standing doctrine.[1]

Respondents' reliance on *LaFleur* v. *Whitman*, 300 F.3d 256 (2d Cir. 2002), is likewise misplaced. That case involved a challenge to agency action under the Administrative Procedure Act, and standing was in part based upon a procedural injury. *Id.* at 270-71. *LaFleur* thus illustrates the second category of cases in which standing has been found based on increased risks of future harm.

Unable to show that the finding of standing here fits within either of these heretofore recognized categories of cases, respondents misstate petitioner's position, asserting that petitioner seeks a ruling that "courts are powerless to find injury-in-fact except as defined by a 'politically accountable entity.'" Opp'n 3, 13. There are numerous injuries, however, that suffice under Article III in the absence of agency action, such as illness or actual environmental harm. The question here is when can an increased risk of future, potential harm suffice to satisfy Article III. There are undoubtedly some situations where a risk of potential future harm is so likely

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[1] Recognizing this, respondents misleadingly claim that the district court considered evidence from politically accountable agencies in finding injury. Opp'n 12 n.8. But the state and federal officials did not testify that the risk of potential harm at issue here was unacceptable. To the contrary, they believed the media protection standards they ordered protected the public health. Similarly, the district court did not rely on evidence of sedimentary mercury in excess of National Oceanic and Atmospheric Administration guidelines because the guidelines had a low accuracy in predicting adverse effects of mercury. Pet. App. 55a n.13.

and/or so grave that it constitutes a cognizable injury. But it is neither "radical," nor a "'no-holds-barred assault on the federal'" judiciary, *id.* at 3, to argue that where, as in this case, a finding of standing rests on a policy-laden judgment that an increased risk of potential future harm may be societally unacceptable, federal courts are improperly making what are essentially legislative judgments to justify the exercise of judicial power under Article III.

Respondents assert that courts are in fact competent to make such policy judgments, *id.* at 3-7, 12-15, noting that courts have the "traditional equitable authority" to address risks in imminent and substantial endangerment cases. *Id.* at 6-7. But respondents have it exactly backwards. Standing has nothing to do with a court's equitable powers, but instead determines whether the court has the constitutional authority to exercise its equitable powers at all. Whether federal jurisdiction exists is a threshold question, one that must be answered before a court can engage the gears of equity.

Even more critically, courts are not, in actuality, competent to make general determinations about societally acceptable levels of risk absent guidance from an expert and politically accountable agency. Such determinations do not turn on factfinding, as respondents suggest. Rather, they are fundamental policy choices, squarely within the province of the political branches. Respondents would have this Court disregard the significant case law cited in the petition, Pet. 15 & n.3, because the cases do not specifically address standing. Opp'n 10 & n.6. But this is beside the point. The cases stand for the principle that deciding when a non-grave risk is societally acceptable falls outside the institutional competence of the courts, which precisely supports the limitation of Article III advanced by petitioner.

None of the cases respondents cite supports the idea that courts can engage in such risk assessments to determine standing. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court expressly

declined to base standing on "present apprehension generated by . . . future uncertainty," finding that it "need not determine" whether that injury was "sufficiently concrete to satisfy constitutional requirements." *Id.* at 73. The Court ultimately based standing on "environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants" as well as the emission of non-natural radiation into the environment. *Id.* at 73-74.[2] This holding does not advance respondents' cause, but granting the petition here will allow the Court to decide the issue it left open in *Duke Power*.

Respondents also argue that Congress authorized courts to make the risk assessment required by the First Circuit's interpretation of standing. Opp'n 7-12. This argument, however, simply begs the question of the scope of RCRA's citizen-suit provision. As petitioner explained, § 7002(a)(1)(B) does not define a statutory injury so broadly as to sweep in all potential risks of future harm except those that can be dismissed as not serious.

In short, respondents have failed to refute petitioner's showing that the First Circuit has expanded standing doctrine beyond any category previously recognized by this Court, and that this expansion raises a profoundly important question concerning the limits of judicial authority under Article III. To the contrary, respondents' defense of that ruling simply underscores the importance of the issue, and the necessity of review by this Court.

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[2] The Court did find that the emission of non-natural radiation was a present injury given "our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants." *Duke Power Co.*, 438 U.S. at 74. As noted above, however, the Court declined to rest standing on this ground alone.

2. Respondents likewise do not seriously dispute that the lower courts' "'sweeping'" and "expansive reading" of § 7002(a)(1)(B), Pet. App. 18a, 31a, raises fundamentally important questions concerning the role of private citizens in enforcing federal environmental laws. Respondents admit that, "among environmental statutes that provide for an agency-implemented regulatory scheme," RCRA is "[a]lone" in permitting citizen suits "*independent* of agency-imposed requirements." Opp'n 7. And a broad interpretation of this unique cause of action permits private citizens to second guess policy-based risk assessments: in this case, EPA ordered a downriver study and media protection standards it deemed sufficient to prevent undue health and environmental risks, but the lower courts' lax liability standard allowed respondents to override this policy judgment and compel a multi-million dollar study to determine whether downriver mercury "[i]s . . . posing an unacceptable risk." JA0274-0275.

Unable to dispute the importance of a statutory interpretation that affords private citizens such co-equal policy-making authority, respondents argue at length that Congress intended this extraordinary result. The text, structure and history of the statute, however, refute that claim.

As petitioner has shown, a lenient liability standard renders § 7002(a)'s bifurcation of citizen suits meaningless, allowing citizens to enjoin (1) all risks EPA deems unacceptable and (2) all other non-*de minimis* risks. Pet. 20-21. The First Circuit conceded this anomaly, but dismissed it as the product of congressional oversight. Pet. App. 26a-27a. Because cardinal rules of interpretation do not permit such cavalier acceptance of statutory redundancy, Pet. 21, respondents do not defend this reasoning. But their alternative rationale fares no better. They note that subsection (a)(1)(B) requires "independent evidence of potential endangerment" while subsection (a)(1)(A) does not, and that different government

actions bar suit under these provisions. Opp'n 23-24.[3] Differences in evidentiary standards or suit-precluding activities, however, do not eliminate the total redundancy in the *substantive scope* of two distinct provisions that the decision below produces: under the lower courts' lenient liability standard, subsection (a)(1)(B) provides a remedy for all potential risks covered by subsection (a)(1)(A)—as well as other risks. Indeed, respondents ultimately admit this. See *id.* at 21 ("Congress conferred 'imminent and substantial endangerment' authority to ensure complete protection against threats from dangerous wastes, irrespective of other remedies" in RCRA).

By contrast, giving "imminent and substantial endangerment" its naturally restrictive meaning avoids this redundancy. Subsection (a)(1)(B) prevents likely threats of grave harm that are not otherwise governed by permits or other regulatory measures. It thus serves as a limited adjunct to the permitting regime. So construed, it does not allow second-guessing of EPA risk assessments. EPA cannot, consistent with its statutory duties, conclude that a likely risk of grave harm is "acceptable." If citizens can sue only to prevent such risks, therefore, they will not override EPA judgments that a particular risk is societally acceptable, but will instead properly supplement EPA's enforcement authority, by addressing an unacceptable risk that the agency has failed, for whatever reason, to address.[4]

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[3] A district court conclusion that civil penalties are not available under § 7002(a)(1)(B), Opp'n 24, is not evidence that the remedial scope of the two subsections differs.

[4] Such supplementation accords with the legislative history respondents quote, Opp'n 18. That history shows only that Congress thought EPA was not enforcing its standards, not that EPA's standards permitted undue risks to health and safety. And while this construction requires courts to assess some risks without EPA guidance, *id.* at 17, they would do so in far more limited circumstances than under the lenient liability standard, which

Nor can RCRA's hierarchy of risk standards and associated remedies be dismissed as a "chimerical construct." Opp'n 19. Respondents claim that an "imminent and substantial endangerment" is not necessarily the most significant risk, because courts have discretion to respond with something other than immediate injunctive relief. *Id.* at 20. But the critical fact is that *only* an "imminent and substantial endangerment" can justify injunctive relief, whereas a "substantial potential risk" and "substantial hazard" cannot. These latter two standards, therefore, must specify risks less significant than an "imminent and substantial endangerment." But, under the lower courts' interpretation, only risks that are not "serious," or give rise to unreasonable medical concerns, are less significant than those embraced by § 7002(a)(1)(B).

Respondents attempt to justify this textual absurdity by arguing that Congress considered "a study to determine appropriate remediation (well short of 'immediate preventive action' . . .) as a suitable response" to an imminent and substantial endangerment. *Id.* at 21 (quoting Pet. 18). But the provision they cite bars suits only if EPA requires a remediation study "*and is diligently proceeding with a remedial action* under" the Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. § 6972(b)(2)(B)(iii) (emphasis added). See also *Acme Printing Ink Co.* v. *Menard, Inc.*, 812 F. Supp. 1498 (E.D. Wis. 1992) (initiation of study does not bar citizen suit). A "remedial action" is a "permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate or cause substantial danger." 42 U.S.C. § 9601(24). Such an EPA action thus involves the same type of actual remediation as the other agency activities that bar suit under § 7002(a)(1)(B), *i.e.*, diligent prosecution of an injunctive action under § 7003, a CERCLA removal action, or issuance

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compels courts to make "medical and scientific conclusions that 'clearly lie on the frontiers of scientific knowledge.'" Pet. App. 53a.

of an administrative or court order compelling a removal action. *Id.* § 6972(b)(2)(B)(i), (ii) & (iv).

The fact that a suit under § 7002(a)(1)(B) can be barred only by permanent remedies—not the studies or monitoring that a "substantial potential risk" or "substantial hazard" trigger—confirms that RCRA does set forth a graduated scale of risks and responses. The lower courts' interpretation of an imminent and substantial endangerment, however, affords no rational, independent meaning to the statute's two lesser risk standards. Contrary to respondents' claim, neither the phrase "may present" nor the legislative history justifies this result.

By changing the phrase "may present" to "is presenting," Congress authorized relief based on *potential*, not just *actual*, endangerments. But that phrase does not also reduce the *degree* of the potential endangerment itself. Thus, the phrase "is presenting an imminent and substantial endangerment" meant an actual and very significant threat; the phrase "may present an imminent and substantial endangerment," in turn, means a potential and very significant threat, not all potential threats except non-serious ones that cause only unreasonable medical concerns, as the courts below held.

Nor can the sentence from a Senate Report that respondents and the First Circuit repeatedly quote, see Opp'n 2, 8, 16, 26; Pet. App. 16a, 29a, bear the weight that they place on it. Congress could have authorized relief whenever hazardous or solid wastes "may present *any risk*." The statute, however, refers instead to an "imminent and substantial endangerment." The stringent meaning of this very different language cannot be ignored based on an unenacted sentence in a Senate Report, particularly where, as petitioner has shown, RCRA's hierarchy of risks and bifurcation of citizen suits confirm that the enacted language is not a mere synonym for the sweepingly broad phrase "any risk."

In short, the language, structure and history of the statute do not justify—and indeed, affirmatively refute—the lower

courts' view that § 7002(a)(1)(B) authorizes private citizens to second guess EPA risk analyses. They likewise refute the lower court's conclusion that the phrase "an imminent and substantial endangerment" empowers federal courts to undertake the same policy-laden risk assessments that Congress entrusted to an expert and politically accountable agency through numerous detailed and far more explicit grants of statutory authority. See Pet. 17. The extraordinary ramifications of the First Circuit's contrary conclusions are themselves sufficient to warrant review of the decision below.

Contrary to respondents' blithe assurances, moreover, the First Circuit's decision is more than a run-of-the-mill application of a well-settled standard. Prior cases involved violations of state or federal standards, *Interfaith Cmty. Org.*, 399 F.3d at 259-61 (violations of state standards); *Cox* v. *City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001) (benzene levels in excess of state standards in a dump accessible to children); *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993, 1002 (11th Cir. 2004) ("PCB and lead levels above the legal limits"); or evidence of current environmental harms, *id.* at 1015 (trees killed); *Dague* v. *City of Burlington*, 935 F.2d 1343, 1357-58 (2d Cir. 1991), *rev'd in part on other grounds by* 505 U.S. 557 (1992) (leachate from landfill toxic to aquatic life). The decision in this case makes clear for the first time that the impermissibly expansive reading of § 7002(a)(1)(B) permits a finding of liability even where a multi-year, multi-million dollar study is necessary to determine whether wastes pose **any** unacceptable risk, and where the plaintiffs' own expert is unsure whether the wastes pose any problem at all.

The impact of such an extraordinary ruling will not be lost on plaintiffs, and the resulting costs on industry will be significant. Properly construed, RCRA does not compel businesses "to internalize the costs of" studies to determine whether decades-old wastes pose an unacceptable threat to human health or the environment. Opp'n 28. The financial

and competitive impacts of the First Circuit's erroneous construction simply underscore that this profoundly important question of federal law should be resolved by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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